

ANN BAVENDER\*  
ANNE GOODWIN CRUMP\*  
VINCENT J. CURTIS, JR.  
RICHARD J. ESTEVEZ  
PAUL J. FELDMAN  
ERIC FISHMAN  
RICHARD HILDRETH  
FRANK R. JAZZO  
ANDREW S. KERSTING\*  
KATHRYN A. KLEIMAN  
EUGENE M. LAWSON, JR.  
HARRY C. MARTIN  
J. TODD METCALF\*  
GEORGE PETRUTSAS  
LEONARD R. RAISH  
JAMES P. RILEY  
KATHLEEN VICTORY  
HOWARD M. WEISS  
\* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW  
11th FLOOR, 1300 NORTH 17th STREET  
ROSSLYN, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

office@fhh-telcomlaw.com

FRANK U. FLETCHER  
(1939-1985)  
ROBERT L. HEALD  
(1956-1983)  
PAUL D.P. SPEARMAN  
(1936-1982)  
FRANK ROBERSON  
(1936-1961)  
RUSSELL ROWELL  
(1948-1977)

RETIRED  
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS  
SHELDON J. KRYS  
U. S. AMBASSADOR (ret.)

OF COUNSEL  
EDWARD A. CAINE\*

WRITER'S NUMBER  
(703) 812-

RECEIVED

JUN 25 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

0474

June 25, 1997

**BY HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Re: Petition for Rule Making and Request for  
Issuance of Order to Show Cause,  
Amendment of Section 73.202(b), FM Table  
of Allotments, (Tishomingo, Tuttle, Woodward,  
and Alva, Oklahoma)

Dear Mr. Caton:

Enclosed herewith on behalf of Chisholm Trail Broadcasting Co., Inc., licensee of Station KXLS(FM), Alva, Oklahoma, are an original and four copies of its "Motion to Dismiss" the above-referenced Petition for Rulemaking, filed March 21, 1997, by Ralph Tyler.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,



Andrew S. Kersting  
Counsel for  
Chisholm Trail Broadcasting Co., Inc.

Enclosures  
cc (w/ encl.): Certificate of Service

No. of Copies rec'd  
List ABCDE

024  
MMB

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

**RECEIVED**

**JUN 25 1997**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No. \_\_\_\_\_  
Table of Allotments, ) RM- \_\_\_\_\_  
FM Broadcast Stations )  
(Tishomingo, Tuttle, Woodward, )  
and Alva, Oklahoma) )

To: Chief, Allocations Branch

**MOTION TO DISMISS**

Chisholm Trail Broadcasting Co., Inc. ("Chisholm"), licensee of Station KXLS(FM), Alva, Oklahoma, hereby moves to dismiss the "Petition for Rule Making and Request for Issuance of Order to Show Cause," filed March 21, 1997 ("Petition"), by Ralph Tyler ("Tyler"). In support of this motion, the following is stated:

I.  
**Tyler Petition**

As stated in his Petition, Tyler is the licensee of Station KTSH(FM), Tishomingo, Oklahoma. Tyler seeks to modify Station KTSH's authorization pursuant to Section 1.420(i) of the Commission's rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). Specifically, Tyler requests that the Commission amend the FM Table of Allotments in the following manner: (i) delete Channel 259C3

at Tishomingo, Oklahoma, (ii) allot Channel 259C3 to Tuttle, Oklahoma, (iii) modify the license for Station KTSH, Tishomingo, to specify Tuttle as its community of license, (iv) modify the license of Station KWFX-FM, Channel 260C1, Woodward, Oklahoma, to operate on Channel 292C1, and (v) modify the license of Station KXLS(FM), Channel 259C1, Alva, Oklahoma, to operate on Channel 260C1.<sup>1</sup> Petition, pp. 1-2. In support of his Petition, Tyler claims, *inter alia*, that the proposed change in community of license of Station KTSH will not deprive Tishomingo of its only local transmission service because “an application (File No. BPED-970127MD) is pending that seeks a construction permit for a new noncommercial educational FM station at Tishomingo.”<sup>2</sup> Petition, p. 3.

## II.

### Tyler’s Petition Should Be Dismissed Because It Would Deprive Tishomingo of Its Only Local Broadcast Service

In *Change of Community R&O*, the Commission stated that it would “not allow any broadcaster to take advantage of this new procedure if the effect would be to deprive a community of an existing service representing its only local transmission service.” 4 FCC Rcd at 4874. Moreover, in its reconsideration order, the Commission stated:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. . . . *We specifically wish to clarify that replacement of an operating*

---

<sup>1</sup> As indicated above, Chisholm is the licensee of Station KXLS, Alva.

<sup>2</sup> Tyler also claims that “[s]ince Tishomingo will *continue to receive* local service from a new noncommercial FM station, [his] proposal will not deprive Tishomingo of its only local transmission service.” Petition, p. 5 (emphasis added). Tyler’s statement clearly is in error. Tishomingo cannot “continue to receive” service from a noncommercial facility which does not exist. See Petition, p. 3.

*station with a vacant allotment or unconstructed permit, although a factor to be considered in favor of the proposal, does not adequately cure the disruption to “existing service” occasioned by removal of an operating station.* From the public’s perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station that can be accessed today simply turning on a . . . radio set.

*Change of Community MO&O*, 5 FCC Rcd 7097 (1990) (emphasis added). *See also Llano and Marble Falls, Texas*, 10 FCC Rcd 4913 (Allocations Branch 1995) (the replacement of an operating station with a vacant allotment does not adequately cure the disruption to existing service); *Kaukana and Cleveland, Wisconsin*, 6 FCC Rcd 7142, 7143, n.3 (Allocations Branch 1991) (same).

In this case, Tyler’s claim that the removal of Station KTSH from Tishomingo will not deprive the community of its sole broadcast service due to the pendency of an application for a new noncommercial station does not comport with the express language of *Change in Community R&O* or *MO&O*, nor is it supported by Commission precedent. In *Klamath Falls, Altamont, and Butte Falls, Oregon, and Dorris, California*, 10 FCC Rcd 7583 (Allocations Branch 1995), the only broadcast station at Altamont was currently off-the-air. In reviewing a counterproposal to change the community of license of that station to Butte Falls, the Chief, Allocations Branch, noted that the requested change in community of license would be less disruptive with the only local broadcast station off the air than it otherwise would be if that station was operating. Nevertheless, after quoting the Commission’s language in *Change in Community MO&O* (set forth above), the Chief found that the residents of Altamont were entitled to a reasonable expectation that service would resume at an earlier date by the already-constructed and once-operating station, than by a new station, which must first go through the administrative process to receive a construction permit and then actual construction before it may become operative. 10 FCC Rcd at 7585-86. The Chief

ultimately found that there was not a sufficiently compelling public interest justification for the removal of Altamont's only authorized local transmission service. *Id.* at 7586.

Just as in *Altamont*, the residents of Tishomingo are entitled to a "reasonable expectation" that the existing service they currently receive from KTSH will continue.<sup>3</sup> Although there is a pending application for a new noncommercial facility at Tishomingo, that application must first go through a lengthy administrative process before a construction permit may be issued, and the new station must be constructed before it can become operative.<sup>4</sup> Thus, Tyler's proposal to remove Tishomingo's sole transmission service on the basis of a pending application for a new station in that community "does not adequately cure the disruption to 'existing service'" that would result from the removal of KTSH. *Change in Community MO&O*, 5 FCC Rcd at 7097. Indeed, in another context the Review Board stated that "the filing of an application . . . does not necessarily assure the expeditious advent of a station." *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781 (Rev. Bd. 1984) (subsequent history omitted). Moreover, the Commission has repeatedly stated that the public interest is not served by removing a community's sole local transmission service merely to provide a first local transmission to another community, *Potts Camp and Saltillo, Mississippi*, 12 FCC Rcd 3712, 3713 (Allocations Branch 1997) (NPRM); *Sibley, Iowa and Brandon, South Dakota*, 11 FCC Rcd 3635 (Allocations Branch 1996) (NPRM); *Llano and Marble Falls, Texas*, 10 FCC Rcd 4913 (Allocations Branch 1995), and Tyler has offered no countervailing public interest benefit sufficient

---

<sup>3</sup> Station KTSH is the only contemporary Christian music station in the Tishomingo area.


<sup>4</sup> The application of South Central Oklahoma Christian Broadcasting, Inc. for a new noncommercial educational station at Tishomingo was recently accepted for filing and placed on a cut-off list inviting mutually-exclusive applications. *See Public Notice*, Report No. A-314 (released June 23, 1997).

to warrant consideration of his proposal. Therefore, Chisholm respectfully requests that Tyler's Petition be dismissed. If and when construction of a new broadcast station at Tishomingo is completed and the station is on the air, Tyler may then resubmit his proposal at that time.

WHEREFORE, in light of the foregoing, Chisholm Trail Broadcasting Co., Inc. respectfully requests that the "Petition for Rulemaking and Request for Issuance of Order to Show Cause," filed March 21, 1997, by Ralph Tyler be DISMISSED.

Respectfully submitted,

CHISHOLM TRAIL BROADCASTING CO., INC.

By:   
Kathleen Victory  
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.  
1300 North Seventeenth Street  
11th Floor  
Rosslyn, Virginia 22209  
(703) 812-0400

June 25, 1997

c:\ask\...\pleading\tishmngo.mot

**CERTIFICATE OF SERVICE**


I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 25th day of June, 1997, copies of the foregoing Motion to Dismiss were hand delivered or mailed first-class, postage pre-paid, to the following:

John A. Karousos, Chief\*  
Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 565  
Washington, DC 20554

Ms. Pam Blumenthal\*  
Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 565  
Washington, DC 20554

Gary S. Smithwick, Esquire  
Smithwick & Belendiuk, P.C.  
1990 M Street, N.W., Suite 510  
Washington, DC 20036  
Counsel for Ralph Tyler

F. Joseph Brinig, Esquire  
Brinig & Bernstein  
1427 Dolly Madison Blvd.  
McLean, Virginia 22101  
(Counsel for Station KWFX-FM)

  
Barbara Lyle

\* Hand Delivered